

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE FIRST CIRCUIT

BAP NO. MB 97-039

IN RE: JOHN P. GARNER

JOHN P. GARNER

Debtor/Appellant

v.

JOSEPH BRAUNSTEIN
Trustee/Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joan N. Feeney, U.S. Bankruptcy Judge)

Before

Goodman, Lamotte and Haines, U.S. Bankruptcy Judges

Timothy M. Mauser on brief for appellant.

Kevin J. Simard on brief for appellee.

January 5, 1998

PER CURIAM.

Before the Bankruptcy Appellate Panel (“Panel”) is John P. Garner’s (“Debtor”) appeal from a June 17, 1997 order of the United States Bankruptcy Court for the District of Massachusetts denying his motion to amend his schedules to claim a state real property exemption. The Bankruptcy Appellate Panel has appellate jurisdiction over this matter pursuant to 28 U.S.C. §158(b).

BACKGROUND

_____ On April 10, 1996 the Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. The Debtor filed his schedules with his petition and elected the federal exemptions with respect to his real property pursuant to 11 U.S.C. §522(d)(1).¹ The Debtor valued his property (“Charlestown Property”) at \$83,000 and indicated that it was subject to a \$82,000 mortgage. The difference between the declared value and the mortgage was claimed exempt under 11 U.S.C. §522(d)(1).

On June 10, 1997, the Debtor filed a motion seeking to amend his original bankruptcy schedules by electing the state real property exemption with regard to the real estate instead of the federal exemption.² Between April 10, 1996 and June 10, 1997 the record shows the

¹ 11 U.S.C. §522(d)(1) declares exempt “[t]he debtor’s aggregate interest, not to exceed \$15,000 in value, in real property or personal property that the debtor... uses as a residence...”

² Debtor’s intent was to obtain an exemption under state law of \$100,000, while the maximum federal exemption was only \$15,000 pursuant to 11 U.S.C. §522(d)(1). The Massachusetts homestead exemption statute provides that
[a]n estate of homestead of one hundred thousand dollars in the land and

following: (1) The property in question was initially valued by the Debtor at \$83,000 with a \$82,000 mortgage. (Tr. p.11, l.20-21)³ The Debtor claimed the \$1,000 difference as exempt pursuant to federal law. (Tr. p.11, l.21) One year later, the property was listed for sale by Trustee for \$139,000 and an offer to purchase the property was received and accepted by Trustee for \$136,000. (Tr. p. 14, l.21) (2) The Trustee requested delivery of the keys to the Charlestown Property on several occasions and could not obtain access to the property for the purposes of inspecting and showing it. (Tr. p.7, l.6-8; p.9, l.6-10; p.10, l.22-25; p.14, l.21-25; p.15, l.1-7) (3) On February 10, 1997, the Bankruptcy Court granted the Trustee's motion to compel access to the Charlestown Property. The Debtor did not comply with the Court order. (Tr. p.12, l.17-18 and l.25; p.13, l.7) (4) In early March, the Bankruptcy Court heard a motion for contempt for failure to comply with the order to compel and issued sanctions against the Debtor and the Debtor's counsel. (Tr. p.10, l.18-20; p.14, l.1-2) Thereafter, the Debtor continued to violate the Court's order compelling the Debtor to allow Trustee access to the property. (Tr. p.14, l.24-25; p.15, l.1-7) (5) The Debtor filed a homestead declaration on April 15, 1997 at the Suffolk County Registry of Deeds one year and five days after the date of the petition. Again, on April 18, 1997 and April 22, 1997, the Debtor denied Trustee access to the property. At no time did Debtor notify Trustee of his attempt to create an exemption in the real property by the filing of a

buildings may be acquired pursuant to this chapter by an owner or owners of a home.... Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies...."

Mass. Gen. Laws Ann. ch. 188, §1 (West 1991 & Supp. 1997).

³ The transcript of the Bankruptcy Court hearing regarding this matter dated June 17, 1997 will be indicated as "Tr.," the page number will be indicated as "p." and the line number will be indicated as "l."

homestead declaration under Massachusetts law until Debtor filed his Motion to Amend Exemptions From Federal to State on June 10, 1997.

The United States Bankruptcy Court heard Debtor's motion to amend exemptions on June 17, 1997 and denied the motion stating:

I'm going to deny the debtor's motion to amend his exemptions from federal to state exemptions, although Federal Rule of Bankruptcy Procedure 1009(a) permits a debtor to amend schedules before a case is closed. Any amendment must not cause prejudice to creditors, and in the present case the amendment will prejudice creditors by reducing the distribution to the estate when compared with the initial exemption as claimed. Moreover, I find that the amendment is made in bad faith because the debtor did not cooperate in the sale, at least initially. (Tr. p.16, l.12-21)

On June 18, 1997, the Debtor filed a Notice of this Appeal.

DISCUSSION

This Panel, with the record on appeal before it, could affirm the decision of the Bankruptcy Court on the issue of Debtor's lack of good faith. There has been no satisfactory explanation of the Debtor's conduct in delaying and thwarting Trustee's efforts and Debtor has failed to adequately deny such conduct. However, we affirm for other reasons.

The issue is not whether the Debtor could amend his schedules to claim the state law exemption instead of the federal exemption, but the more basic question of whether the Debtor even had a recognizable state law exemption in the real estate. We find that the Debtor's attempt to create a state law exemption by filing the homestead declaration in the proper state indices as required by Massachusetts law is a nullity because it was not timely filed. The Bankruptcy Code provides that "an individual debtor may exempt...property that is exempt

under...State or local law that is applicable on the date of the filing of the petition....” 11 U.S.C. §522(b)(2)(A). Since Debtor failed to record a homestead declaration in the real estate until one year and five days post-petition, he did not have a state law exemption in the real estate on the date of filing.

The Bankruptcy Code permits debtors to select between itemized federal exemptions and state law exemptions “...unless the State law that is applicable to the debtor...specifically does not so authorize.”⁴ Massachusetts has not “opted out” of the federal list of exemptions;⁵ therefore, Debtor could have elected either federal or state law exemptions provided they existed on the petition date. After electing the federal law exemptions, Debtor attempted to amend his schedules to claim the state law exemptions because he learned that the equity in his real property exceeded the \$15,000 federal exemption limit.

Massachusetts law governing homestead exemptions mandates, “[t]o acquire an estate of homestead in real property... after the title has been acquired, such design may be declared by a writing duly signed, sealed and acknowledged and recorded in the registry of deeds for the county or district in which the property is situated.” Mass. Gen. Laws Ann. ch. 188, §2 (West 1991 & Supp. 1997). In re Messia, 184 B.R. 176, 177 (Bankr. D. Mass. 1995), Judge Hillman stated that “[u]nder Massachusetts law, homestead is not an automatic right. The claimant must file a declaration of homestead.” On April 10, 1996, the petition date, there was no Massachusetts homestead exemption available to the Debtor since the homestead declaration

⁴ 11 U.S.C. §522(b); Owen v. Owen, 500 U.S. 305, 308(1991)(discussing the “opt out” provision in the Bankruptcy Code).

⁵ In re Boucher, 203 B.R. 10, 11 (Bankr. D. Mass. 1996).

had not been timely filed.

The Bankruptcy Court's decision denying the motion to amend exemptions is
AFFIRMED.